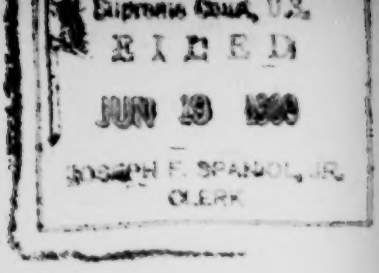
89-874



No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

James Earl Ray, Petitioner

v.

Otie Jones, Warden

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Dr. William F. Pepper
Attorney for Appellant
Juris Chambers
8 Stone Buildings
Lincoln's Inn
London WC2A 3TA
Tel: (44) 1 831 9591

QUESTIONS PRESENTED

The questions presented by petitioner and requested for review by this Honorable Court are the following:

1. Whether a habeas corpus petitioner is entitled to have and use newly discovered evidence represented by and contained in notes of the original prosecutor who previously withheld and concealed them from petitioner even in the face of a previous evidentiary hearing discovery Court Order.

2. Whether it is proper for a trial court judge to appoint as co-counsel for a defendant the same attorney previously appointed by the same judge and in the same proceedings, to represent the chief

prosecution witness, and whether a guilty plea given by said defendant being unaware of the dual appointments should be allowed.

3. Whether an evidentiary hearing must be ordered when a habeas corpus petition alleges material acts, omissions and events of constitutional significance and where the underlying facts thereto are either in dispute, have not been developed or are dehors the record.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTUES

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1989

No.

James Earl Ray Petitioner

v.

Otie Jones, Warden

PETITION FOR A WRIT OF CERTIORARI TO United States Circuit Court of Appeals for the Sixth Circuit

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

James Earl Ray, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above entitled case on May 11, 1989.

OPINIONS BELOW

The March 23, 1989 and May 11, 1989 orders of the United States Circuit Court of Appeals for the Sixth Circuit, which judgments are herein sought to be reviewed and are printed in Appendix B hereto, infra pages 50-52 and 53-54 respectively. The prior Magistrate's report of the United States District Court for the Western District, Western Division of Tennessee is printed in Appendix A hereto infra pages 37-49, and the Judgment of the Court is printed in Appendix B hereto infra pages 55-56.

JURISDICTION

The Order of the Court of Appeals was finally entered on May 11, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1, the Due Process clause, of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

"All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves the Sixth Amendment to the Constitution of the United States which provides as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

This case also involves the following statutory provisions of the United States Code:

28 U.S.C. Sec. 2243

"Unless the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained...The Court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

28 U.S.C. Sec. 2254(d)

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or otherwise reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit:

1. that the merits of the factual dispute were not resolved in the State court hearing;

2. that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

3. that the material facts were not adequately developed at the State court hearing;

4. that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

5. that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

6. that the applicant did not receive a full, fair and adequate hearing in the State court proceeding; or

7. that the applicant was otherwise denied due process of law in the State court proceeding;

8. or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due

proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered "1." to "7.", inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered "8." that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

STATEMENT OF THE CASE

This is a petition for a writ of habeas corpus filed by James Earl Ray in respect of his incarceration in the State Penitentiary, pursuant to a Shelby County, Tennessee criminal court sentence of ninety nine (99) years, following a plea of guilty on March 10, 1969 to the charge of first degree murder in the assassination of Dr. Martin Luther King Jr.

In the periods leading up to the plea, after

petitioner was taken into custody in the State of Tennessee, he had continually maintained his innocence of the capital crime and expressed a determination to stand trial. He acceded to a guilty plea only in the last instance after strong urging and considerable pressure exerted by his then new counsel Percy Foreman of Houston, Texas.

After the plea, when he had an opportunity to reflect, petitioner finally requested that his plea of guilty be withdrawn and that he be allowed to stand trial as had always been his intention. Though Tennessee statutory law (now Tenn. Code Ann. Sec. 17-1-305, then Sec. 17-117), appeared to require a new trial upon the death of the trial judge, the trial Court denied petitioner's request and this decision was

upheld by the Tennessee Supreme Court. Ray v. State, 224 Tenn. 164, 451 S.W. 2d 854 (1970).

Petitioner, subsequently, filed a State Court petition seeking post conviction relief alleging ineffective assistance and conflict of interest of the then present counsel Percy Foreman and previous counsel Arthur J. Hanes Sr. The petition was denied. Ray v. State, 480 S.W. 919 (Tenn. Crim. App. 1972) (cert. denied May 1, 1972).

The petitioner next filed a petition for a writ of habeas corpus in the Federal District Court of the Middle District of Tennessee. Said petition was dismissed without an evidentiary hearing. Ray v. Rose, 373 F. Supp. 687 (M.D. Tenn., 1973). On appeal, the United States Court of Appeals

for the Sixth Circuit reversed and remanded for an evidentiary hearing. Ray v. Rose, 491 F. 2d 285 (6th Cir. 1974) cert. denied, 417 U.S. 936 (1974).

The Court held that an evidentiary hearing was clearly required under the circumstances noting that "...waivers of constitutional rights are not lightly to be found..." (Id. at 290).

Prior to the holding of the evidentiary hearing, the Federal District Court conducted a preliminary hearing and entered an Order on June 24, 1974 which designated two primary constitutional issues to be decided subsequent to resolution of the related factual questions.

1. Whether or not petitioner had effective

assistance of counsel.

2. Whether or not petitioner's guilty plea was made intelligently and voluntarily.

Following the eight day hearing the Court denied the petition Ray v. Rose, 392 F. Supp. 601 (W.D. Tenn. 1975).

Based on evidence before it at the time the Court found, as paraphrased below, the following:

" 1. That original counsel Arthur Hanes did arrange for a professional investigation and did not rely on author William Bradford Huie to conduct same or dictate the manner in which the criminal case would be tried...(Id. at 608).

2. That original counsel Arthur Hanes when discharged had not determined whether he would advise petitioner to testify at his trial...(Id. at 609).

3. That the Shelby County Criminal Court Trial Judge Preston Battle appointed Public Defender Hugh Stanton Sr. for investigation and representation purposes of petitioner on December 18, 1968...(Id. at 611).

4. That Trial Court Judge Battle in a hearing on January 17, 1969 with Public Defender Hugh Stanton Sr. and petitioner both present, though counsel Foreman was not, due to illness, changed the nature of Public Defender Stanton Sr.'s responsibility, requiring him to become co-counsel and directing

him to take full charge of petitioner's defense should it become necessary ... (Id. at 611).

5. That pursuant to the Trial Court's direction Public Defender Stanton Sr. became fully involved with petitioner's defense, devoted extensive time and effort to the case and was in no way peripheral to the defense effort...(Id. at 611).

6. On December 18, 1968, immediately after Public Defender Stanton Sr. had been appointed co-counsel to work with Foreman by Judge Battle, he initiated a discussion out of petitioner's presence about the possibility of petitioner pleading guilty...(Id. at 611-12).

7. That one reason acceptable to the Court for Foreman's failure to associate a Tennessee lawyer, was that petitioner had in December, 1968, the Public Defender Hugh Stanton Sr. appointed by the Court, "thereby making available experienced counsel who practised in Shelby County, Tennessee.."(Id. at 614).

8. That all other factual allegations in respect of petitioner's relationship with counsel Foreman were not established by the proof before the Court at that time, and the investigation and representation of petitioner by Hanes and Foreman were well above the minimum standards required of attorneys...(Id. at 615).

9. That the total record of petitioner's confinement prior to the guilty plea as a matter of fact from counsel was not below the minimum standards required, neither was the guilty plea involuntary or coerced, nor was there a fatally prejudiced conflict of interest between the petitioner and counsel sufficient to render his guilty plea involuntary...(Id. at 615-20)."

This opinion of the Federal District Court for the Western District of Tennessee was affirmed on appeal. Ray v. Rose, 535 F. 2d 966 (6th Cir. 1976), cert. denied 429 U.S. 1026 (1976).

The factual questions, including those set forth above, and the legal issues before the District Court on remand, must therefore be

deemed finally resolved based on the evidence then before the Court requiring the introduction of new evidence for any further consideration or review in successive petitions.

In the next instance, petitioner filed for post conviction relief in the State Courts, based on the alleged violation of Tenn. Code Ann. Sec. 17-117. The Trial Court denied the petition and the Court of Criminal Appeals affirmed. Ray v. State of Tennessee, No. P-1973 (Shelby County Crim. Court, June 19, 1979), petition denied, affirmed on appeal, Ray v. State, Shelby County No. 36 (Tenn. Crim. App., June 19, 1980), cert. denied (Tenn. Sup. Ct., Sept. 11, 1980).

Then, in 1982, petitioner became aware for the first time, of the existence of some ten

pages of notes made during the period just prior to petitioner's guilty plea, by former Tennessee Attorney General, Phil M. Canale, the State's chief prosecutor. These notes, referred to as the "Canale Memoranda", had up to that time been withheld from the Court even in defiance of a records subpoena by petitioner's counsel in the previous habeas corpus evidentiary hearing. Ray v. Rose, 392 F. Supp. 601, supra. Mr. Canale did honour a subsequent subpoena from the Committee of the U.S. House of Representatives, the "Select Committee on Assassinations", and it was from a volume published by that committee containing the Canale Memoranda that the petitioner learned of their existence.

Partly as a consequence of becoming aware of the contents of the Canale Memoranda, the

petitioner then filed a further petition for post conviction relief on May 11, 1984 in the Shelby County Criminal Court. The newly discovered evidence contained in the Canale Memoranda were raised in the State Court petition and are also relevant to grounds for relief claimed in the instant petition. The grounds raised and ultimately denied then, and which are now before the Court, though amalgamated, are the following:

1. newly discovered evidence;

2. ineffective assistance of counsel;

3. conflict of interest of counsel;

4. ineffective assistance of counsel at the sentencing stage;

5. failure of the jury to specify the degree of homicide which applied to the petitioner's guilty plea as required under Tennessee law Tenn. Code Ann. Sec. 39-2404; and

6. failure of the jury to set the sentence following the plea of guilty as required under Tennessee law Tenn. Code Ann. Sec. 40-2707, 40-2310.

The exhaustion of the State Court remedies in respect of each and every one of these claims may be summarised as follows:

The pro se petition was denied without an evidentiary hearing in May, 1985, by the Trial Court which issued a Memorandum of findings of fact and conclusions of law. Ray v. State, No. P-3623 (Shelby County Crim. Court, May, 1985). The dismissal was

affirmed on appeal on February 5, 1986 by the Court of Criminal Appeals. State v. James Earl Ray, Shelby County no. 41 (Tenn. Crim. App., February 5, 1986). Petitioner's application for leave to appeal to the Tennessee Supreme Court was then denied on June 2, 1986. State v. James Earl Ray, Shelby County No. 41 (Tenn., Jackson, June 2, 1986).

Each and every factual question set forth in these proceedings and the relevant applicable conclusions of law related to the grounds for relief alleged by petitioner have been raised before the State Courts and made available for consideration and review at every level of the State judicial system ending with the denial of petitioner's application for permission to appeal to the Tennessee Supreme Court on June 2, 1986.

Subsequently, the proceedings leading to this appeal were commenced by petitioner filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. Sec. 2254, on December 23, 1986.

THE COURSE OF THE PROCEEDINGS IN THE DISTRICT COURT

The petition was filed pro se on December 23, 1986 in the U.S. District Court for the Western District of Tennessee.

The petitioner contended in the absence of any evidentiary hearing it was obvious that:

1. the procedure for finally resolving questions of fact employed by the State Court was not adequate to afford a full and fair hearing;

2. the material facts were not adequately developed in the State Court; and

3. thus, the merits of the factual dispute were not resolved in the State Court proceedings.

The petitioner requested that:

1. the Court issue an order that the respondent show cause as to why the petition should not be granted;

2. the Court set the matter down for an evidentiary hearing; and

3. the Court grant such other relief as the Court deemed just and proper.

The petitioner's contentions and requests as

filed in those proceedings were based on seven stated grounds for relief, there amalgamated and set out in five points of argument, with newly discovered evidence alleged in support thereof.

The respondent's response was filed on January 20, 1987, and the United States District Court Judge, Julia S. Gibbons, referred the petition to the United States Magistrate for an evidentiary hearing, if the Magistrate deemed it necessary, and for a report and recommendation.

The Magistrate's report, filed on April 13, 1988, recommended that the petition be dismissed. Overruling petitioner's objections to the Magistrate's report the District Court Judge adopted the report of the Magistrate and dismissed the petition on

May 26, 1988 with Judgment entered on June 3, 1988. Petitioner then filed pro se a motion for a Certificate of Probable Cause which was granted on July 21, 1988. A Notice of Appeal was filed on July 21, 1988 and the Preliminary Record was mailed to the Court of Appeals on August 10, 1988.

Without allowing oral argument on the issues, the Court of Appeals affirmed the lower Court's decision, dismissing the petition and entering an Order on March 23, 1989.

A petition for rehearing with a suggestion for rehearing en banc was filed pursuant to Rule 35 of the Federal Rules of Appellate Procedure and Rule 14 of the Local Rules of the Sixth Circuit Court of Appeals and denied on May 11, 1989.

REASONS FOR GRANTING THE WRIT

1.
Certiorari Should Be Granted In Order To Resolve Conflicts In Principle With Other Decisions Of The Sixth Circuit Court Of Appeals

1.1 Withheld Evidence

Nowhere has the Court below asserted that there did not exist a reasonable possibility that the verdict in the instant case at least as to the sentence fixed might not have been materially affected if the evidence referred to had not been withheld by the prosecution but made available to the sitting jurors. Hence, the Sixth Circuit Court of Appeals previous ruling in Jones v. Jago, 675 F. 2d 1164 (6th Cir.) cert. denied, 1139 U.S. 848, 96 S.Ct. 228, 56 L. Ed. 2d 96 (1978) is applicable to the instant case and has not been

distinguished in any way. The Sixth Ciruit holding in Jones is particularly relevant since under Tennessee law, at the time, it was an explicit obligation, imposed by statute, of the jury to fix the term of sentence.

1.2 Requirements For an Evidentiary Hearing

Nowhere has the Court below attempted, even minimally, to distinguish the instant case from a whole series of previous Sixth Circuit case holdings in respect of the requirements for the holding of an evidentiary hearing in a case such as the instant one where facts are in dispute.

The decision of the Court below directly contravenes the previously established principle of a petitioner's right to a

hearing in such circumstances. Conflict and uncertainty in the law of the Sixth Circuit on this issue results from the ruling of the Court below in the instant case which contravenes previous decisions in the following cases:

McCrea v. Jackson, 148 F. 2d 193 (6th Cir. 1948)

Brown v. Frisbie, 178 F. 2d 271 (6th Cir. 1949)

Greene v. Michigan Department of Corrections, 315 F. 2d 546 (6th Cir. 1963)

Sharp v. State of Ohio, 314 F. 2d 799 (6th Cir. 1966)

Stidham v. Wingo, 452 F. 2d 837 (6th Cir. 1971)

Clay v. Black, 455 F. 2d 667 (6th Cir. 1972)

In addition the Court below has also held in Venable v. Neil, 463 F. 2d 1167 (6th Cir. 1972) that an evidentiary hearing is required so long as the

factual obligations, if true, constitute a violation of a constitutional right. To now ignore this well established and long standing principle without even the benefit of oral argument or distinguishing discussion will surely cause considerable uncertainty, as to the law of the Sixth Circuit on this issue.

2.
Certiorari Should Be Granted In Order To Resolve Conflicts In Principle With Decisions of the Supreme Court And The Statutory Requirements of 28 U.S.C. Sec. 2254 (d)

2.1 Requirements For an Evidentiary Hearing

The ruling of the Court below does not demonstrate or even discuss the basis for taking the instant case outside of the clear requirement of the United States Supreme Court in Townsend v.

Sain, 372 U.S. 293 (1963), or as noted above the whole range of Sixth Circuit cases applying Townsend, clearly holding that it is mandatory for an evidentiary hearing to be held at the District Court level where facts are in dispute as petitioner has demonstrated they are here. The Townsend criteria have long been applied in such cases and the Circuit Court's ruling in the instant case is in clear contravention of its principle. Uncertainty in the law is bound to result.

The Court below, also without opinion or discussion, ignored petitioner's claim that the statutory criteria required for an evidentiary hearing under 28 U.S.C. Sec. 2254 (d) are met in the instant case with the presence of exceptions

"(1)", "(2)", and "(3)", and "(6)" being incorporated by inference.

2.2 Counsel's Conflict of Interest

Nowhere has the Court below distinguished petitioner's status in law and fact from the well established principle of law that counsel or co-counsel representing a prosecution witness - here, the chief witness - may not also represent the defendant in the same criminal proceedings. This principle in respect of such an actual conflict of interest even extends, as we know, to representation of co-defendants. In the instant case it appears in its most blatant form with counsel having one foot in the camp of the prosecution as counsel to the chief witness, who was seeking a monetary

reward, and the other in the defense camp. The role of the conflicted counsel was not insignificant as petitioner demonstrates at length and in detail. Counsel's elevation by the court to the role of full co-counsel with instructions to be ready to take the matter to trial, and his extensive activity, clearly indicate that he was anything but an errand boy. The Circuit Court's Order, issued without the benefit of oral argument and discussion of this issue, flies in the face of the long established principle of this Court which disallows such conflicts. Specifically contravened are aspects of law established by the following cases:

Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 92 L. Ed. 680 (1942).

Holloway et al. v. Arkansas, 435 U.S. 475, 98 S.Ct 1173, 55 L. Ed. 2d 426 (1978).

Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1706, 64 L. Ed. 2d 333 (1980).

Duckworth v. Serrano, 454 U.S. 1, 102 S.Ct. 18, 70 L. Ed. 2d 1 (1981).

Strickland v. Washington, 466 U.S. 668 (1984).

The opinion of the lower Court without carefully distinguishing the instant case from those cases above causes a manifest uncertainty to exist in respect of this issue of law.

In any event, petitioner maintains that in law and fact the instant case is indistinguishable from previous cases on point and that the principle must be applied.

The Court below further disregarded and contravened the generally accepted principle of law that such conflicts and

the effectiveness of counsel should extend to the plea bargaining and sentencing stages and any collateral proceedings. By ignoring the obligations thus imposed on defense counsel in this case the lower Court's decision clearly appears to contravene without argument or even discussion the U.S. Supreme Court's rulings in Strickland and Mempha v. Rhay, 398 U.S. 128, 88 S.Ct. 254, 19 L. Ed. 2d 336 (1967).

2.3 Withholding of Evidence By The Prosecution

Nowhere has the Court below distinguished as inapplicable to the facts and circumstances of the instant case the contrary well established principle of law decided by the Supreme Court in Brady v. Maryland, 373 U.S. 83,

83 S.Ct. 1194, 10 L. Ed. 2d 215. Such suppression of evidence by the prosecutor, irrespective of good or bad faith, plainly violates due process. It was so held in Brady and the decision in the instant case contravenes Brady.

Also contravened by the lower Court's opinion in the instant case is the U.S. Supreme Court's 1980 ruling in Hicks v. Oklahoma, 447 U.S. 346, 100 S.Ct. 2229, 656 L. Ed. 2d 333 (1980), since the withheld evidence might well have materially altered a result in which petitioner received the longest possible sentence.

The lower Court's decision in the instant case without any distinguishing argument or discussion being allowed

also contravenes Hicks or, at the very least, leaves the law on this principle under a cloud of uncertainty.

3.
Where, Lower Court Summary Decisions Appear To Contravene Principles Established In The Same Circuit And/Or By The Supreme Court, The Absence Of Any Argument And Opinions Can Only Result In Confusion About The Law And Impair The Credibility Of The Courts And Public Confidence In The Judicial Process

3.1 Upon examination of the history of this petition it is glaringly obvious that the District Court Magistrate and the Court below did not even attempt to respond to the substantive principles raised by the petitioner and further disregarded the uncertainty of law that was bound to result from a summary dismissal in that Court.

The Sixth Circuit Court of Appeals in affirming without discussion, the Magistrate's decision contravenes the law and precedent established by the Supreme Court. This must be an intolerable and unacceptable result for it can only serve to impair the dignity of the law and to bring both the law and the judicial system itself into disrepute. Such an unconsidered, nonchalant affirmation by the Court below where fundamental issues and principles of law are involved is beneath the dignity of any court, no matter how heinous the crime or how loathsome the petitioner.

If the Court below is able to distinguish the instant case from others in which contrary decisions have been handed down by the same Sixth Circuit

Court or by this Honorable Court, then, surely justice, the credibility and consistency of the judicial system, upon which the public confidence must be founded, compels at the very least an expository opinion setting forth the underlying reasons for the decision. By denying that petitioner has met the principal requirements for an evidentiary hearing, ignoring the legal significance of the conflict of interest of counsel and the concealment of evidence by the prosecution, the decision of the lower Court has contravened established case law precedent and practice.

Petitioner herein, does not simply cry out for the application of stare decisis, nor does he seek a blind

adherence to the precedents of previous court decisions, but he does respectfully request that at the very least, some court reviewing his petition (and now it is presented before the Court of last resort), take the time to consider, analyse and issue a legal opinion on the principal issues. To date, petitioner has received three separate edicts in the form of Orders with no one being more than a 26 line unreasoning pronouncement.

No matter how formidable the political and social opposition to the petitioner's pleas, it is unbecoming of this or any other court to act in such a fashion. Justice must not only be done it must be seen to be done. An independent judiciary, unbiased, free

from prejudice and independent of any faction is surely liberty's most treasured bastion, the preservation of which is the awesome responsibility of each member of the bench.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted.

William F Pepper
Juris Chambers
8 Stone Buildings
Lincoln's Inn
London WC2A 3TA
Tel: (44) 1 831 9591

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JAMES EARL RAY,

Petitioner.

FILED
APR 13 1988
CLERK

vs.

NO 86-2994-GB

MICHAEL DUTTON,
ET AL.,

Respondents.

REPORT

This is another in a long line of post-conviction cases filed by James E. Ray, who was convicted of murder in Memphis, Tennessee and sentenced to 99 years in prison on March 10, 1969. This is another petition for federal habeas corpus relief under 28 U.S.C. 2254. A prior petition was litigated in this court in 1975 and resulted in an opinion by Judge Robert M. McRae, Jr. reported as Ray vs. Rose, 392 F. Supp. 601 (W.D. Tenn. 1975), and affirmed on appeal at 535 F. 2d 966 (6th Cir. 1976). The

petitioner has also had numerous reported and unreported state proceedings subsequent to his guilty plea, some of which will be referred to in this report.

In his current petition Mr. Ray asserts the following seven grounds for relief:

1. There is newly discovery evidence in the form of certain handwritten notes kept by Mr. Phil Canale, the District Attorney General of Shelby County, Tennessee in 1968 and 1969 when the plaintiff was prosecuted.

2. The petitioner was denied effective assistance of counsel by his co-counsel, Hugh W.Stanton, Sr.

3. The petitioner was denied effective assistance of counsel because his co-counsel, Hugh W. Stanton, Sr., had a conflict of interest.

4. Petitioner was denied effective assistance of counsel by his chief attorney, Percy Forman, and Mr. Forman's dealings with Mr. Canale.

5. The jury did not specify the degree of homicide as required by Tennessee Code Annotated 39-2404.

6. The jury did not fix his sentence

as required by Tennessee Code Annotated, 40-2707 and 40-2310.

7. There has been a change in the law concerning effective assistance of counsel since petitioner's prior applications for habeas corpus relief.

First, it should be pointed out that petitioner's asserted grounds one and seven are not grounds in themselves for habeas corpus relief under 2254, although claim number one might arguably be a basis for the federal court to permit a successive petition.

Petitioner's grounds two, three, and four address various aspects of a claim of ineffective assistance of counsel. The question of ineffective assistance of counsel for Mr. Ray was extensively litigated in this court in 1975 and resulted in a twenty page opinion by Judge McRae in which he concluded that, despite certain

improprieties by counsel, Mr. Ray had not been denied his Sixth Amendment right to effective assistance of counsel. He made this statement:

> Although the circumstances include conduct on the part of Ray's retained attorneys that should have been performed differently, the total circumstances do not reflect a violation of the constitutional rights applicable to one who voluntarily pleaded guilty on the advice of competent counsel of his own choosing.

Ray vs. Rose, above, at 621. That conclusion was affirmed by the Sixth Circuit Court of Appeals. Mr. Ray, however, maintains that the notes made by the prosecutor, Mr. Canale, and certain other information he has obtained since the prior decision cast such a new light on the matter that the court should grant him a new hearing.

As pointed out in Judge McRae's decision, Judge Battle of the Criminal Court of Shelby County, held a hearing in petitioner's case on December 18, 1968 to determine whether the case was ready for trial. Mr. Ray's retained attorney, Mr. Percy Forman, argued that he could not be ready for trial by March 3, 1969 as scheduled. At that point Judge Battle determined that petitioner was eligible for the services of the public defender and appointed the public defender to represent him under the direction of Mr. Forman. Later, Forman was taken ill and Judge Battle told the public defender to prepare to take full charge of Mr. Ray's defense if it should become necessary due to Forman's illness or for any other reason. Mr. Hugh Stanton, Sr., the public defender, tried to confer with Mr. Ray in jail, but he refused to see him, stating that Mr. Forman

was his chief counsel and that, if for any reason Forman could not serve, he would hire someone else. As it turned out Forman recovered from his illness, returned to Memphis and represented Mr. Ray at his guilty plea. Mr. Stanton and his office did investigative and support work on the case and, as the Canale notes indicate, did make inquiries of the prosecutor concerning Ray's pleading guilty. It was, however, Forman, the retained attorney, who negotiated the guilty plea, dealt with Mr. Ray concerning that plea, and represented him at the plea hearing.

Mr. Ray has now obtained documentation that Mr. Stanton represented Charles Quitman Stephens in a habeas corpus petition in the Circuit Court of Shelby County, Tennessee. Stephens was a material witness against Ray. The petitioner therefore claims that that

conflict of interest coupled with Mr. Stanton's conversations with Mr. Canale concerning a guilty plea are sufficient to show ineffective assistance of counsel and permit the petitioner to pursue a successive petition on the issue.

The petitioner relies on the 1980 Supreme Court case of Cuyler vs. Sullivan, 446 U.S. 335 (1980), as a basis for his current claim. That case dealt with trial cunsel representing multiple defendants at a joint trial. The court held that, in such a situation, "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." 446 U.S. at 349-350.

Here, the representation that the petitioner is complaining of is representation in regard to a guilty plea.

It was Mr. Forman who dealt with and represented the petitioner on his guilty plea, not Mr. Stanton. Petitioner would not even talk with Stanton. All the Canale notes indicate that Mr. Stanton did in respect to the guilty plea was make some inquiries on behalf of Forman, who ultimately negotiated the plea with the prosecutor. Therefore any conflict of interest by Mr. Stanton would not have affected the adequacy of petitioner's representation in regard to his guilty plea.

The information about Mr. Stanton's purported conflict is not, under the circumstances of the case, sufficient to permit the petitioner to reopen the question of ineffective assistance of counsel on his guilty plea and relitigate a matter that has been so thoroughly litigated in so many courts.

In his fourth ground for relief Mr. Ray contends that he was denied effective assistance of counsel at his guilty plea and sentencing because of certain advice, revealed in the Canale notes, from Mr. Canale to Mr. Forman concerning the procedure to be followed at the guilty plea and sentencing. The notes, however, indicate nothing but Mr. Canale telling Mr. Forman, a Texas lawyer, what the customary procedure for such proceedings was in Tennessee courts. The guilty plea had been agreed upon and the only thing that remained was the formality of presenting it to the court. There is no indication of ineffective assistance of counsel because Mr. Forman solicited, and Mr. Canale gave, advice concerning the proper procedures for such matters in Tennessee courts.

The petitioner also complains that Mr. Forman was told by Mr. Canale to announce that he agreed that the state would prove the matters set out by the prosecutor. This, however, addresses the effectiveness and performance of Mr. Forman in respect to the guilty plea, a matter that has already been thoroughly litigated.

The heart of Mr. Ray's petition is that he should be permitted to reopen and present a successive petition for habeas corpus relief on the question of ineffective assistance of counsel based upon the Canale notes that have come into his possession since the original proceedings. He presented this same question to the Tennessee courts, and the Tennessee Court of Criminal Appeals said this:

> Regarding the so-called "Canale Memorandums," the appellant argues that the contents materially relate to

his prior complaints about the services rendered to him by his trial counsel. After reviewing this material, which consisted of chronological notes kept by the Shelby County District Attorney General at the time of the appellant's guilty plea regarding the progress of the case, the trial court found that these notes were just "a short history of the matters discussed by the attorneys during the course of the case, culminating with the guilty plea," and that such did not relate to the issue of ineffective assistance of counsel. We have reviewed these notes and agree with the trial judge that there is nothing in these notes that would rise to the level of indicating any ineffectiveness of counsel. Also, we see nothing in these notes that would have any legitimate bearing upon the question of the validity of the appellant's guilty plea. These notes contain nothing that would show any constitutional infirmity regarding the appellant's conviction.

We point out that in our Supreme Court's initial review of the appellant's guilty plea, the court found he had "willingly, knowingly and intelligently and with the advice of competent counsel entered a plea of guilty to murder in the first degree ..." Ray vs. State, supra, 224 Tenn. at 172.

Under 28 U.S.C. 2254 findings made by a state court are presumed to be correct unless any of the conditions set forth in 28 U.S.C. 2254(d) are found to exist or unless the state court determination is not fairly supported by the record. As noted above, the state court determination is supported by the record, and it does not appear that any of the specific provisions of 28 U.S.C. 2254(d) are present. Sumner vs. Mata, 449 U.S. 539 (1981).

Finally, the petitioner complains that the jury did not specify the degree of homicide as required by Tennessee Code Annotated 39-2404 and did not fix his sentence as required by Tennessee Code Annotated 40-2707 and 40-2310. These are state law claims that are not proper issues for a federal habeas corpus petition. The petition entered a guilty plea and was

sentenced by a court of competent jurisdiction. For federal constitutional purposes a guilty plea waives jury consideration of a defendant's case. Section 2254 provides for habeas corpus relief when a person is being held in state custody in violation of the constitution or laws of the United States. It does not provide for habeas corpus relief simply because a state statutory law was not complied with. For this reason, petitioner's claims five and six should be rejected. Likewise, since they are not properly cognizable as grounds for relief under Section 2254, they should not be considered in determining whether petitioner has fully exhausted his state remedies. For that reason, I have not addressed respondent's exhaustion argument.

I, therefore, recommend that this petition be dismissed.

SUBMITTED this the 13th day of April, 1988.

/S/ Aaron Brown, Jr.
AARON BROWN, JR.
UNITED STATES MAGISTRATE

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN DAYS. FAILURE TO FILE THEM WITHIN TEN DAYS WILL CONSTITUTE A WAIVER OF OBJECTIONS AND EXCEPTIONS.

APPENDIX B

No. 88-5880

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MAR 23 1989
LEONARD GREEN, Clerk

JAMES E. RAY,

Petitioner -Appellant,

v.

ORDER

MICHAEL DUTTON, WARDEN,

Respondent-Appellee

BEFORE: MARTIN and MILBURN, Circuit Judges; and HACKETT, District Judge.*

James E. Ray, proceeding with benefit of counsel, appeals the judgment of the district court dismissing his petition for writ of habeas corpus filed pursuant to 28 U.S.C. 2254. This case has been referred

*The Honorable Barbara K. Hackett, U.S. District Judge for the Eastern District of Michigan, sitting by designation.

to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and the briefs, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In his petition Ray asserted seven grounds for relief. Primarily, he argued that the handwritten notes of the Shelby County, Tennessee, District Attorney General and other recently discovered information provide him proof that would entitle him to a new hearing.

The case was submitted to a magistrate who recommended dismissing Ray's petition. The magistrate found the prosecutor's notes and other "newly discovered" evidence to be entirely insufficient to permit Ray to reopen and present anew the question of ineffective assistance of trial counsel.

The magistrate also found four of Ray's arguments to be improper grounds for habeas corpus relief under section 2254.

The district court, in light of Ray's objections to the magistrate's report, adopted the report and accepted the recommendation. Upon review, we find no error.

Accordingly, for the reasons set out in the magistrate's report dated April 13, 1988, as adopted by the district court, we hereby affirm the judgment of the district court pursuant to Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/S/ Leonard Green
Clerk

No. 88-5880

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MAY 11 1989
LEONARD GREEN, Clerk

JAMES E. RAY,

Petitioner -Appellant,

v.

ORDER

MICHAEL DUTTON, WARDEN,

Respondent-Appellee

BEFORE: MARTIN and MILBURN, Circuit Judges; and HACKETT*, United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the

*Hon. Barbara K. Hackett sitting by designation from the Eastern District of Michigan

suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/S/ Leonard Green
Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JAMES EARL RAY,

Plaintiff(s).

FILED
JUN 2 1988
CLERK

vs. CIVIL NO 86-2994-GB

MICHAEL DUTTON, Etal

Defendant(s).

JUDGMENT ON THE DECISION OF THE COURT

This action came on for consideration before the Court, the Honorable Julia Smith Gibbons , United States District Judge, and the issues having been duly considered and a decision having been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the provisions as set forth in the Order entered May 31, 1988 on clerk's docket, the report of the Magistrate is adopted and petition is hereby DISMISSED.

This document is entered on docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 6-3-88

APPROVED:

/S/ Julia Smith Gibbons
UNITED STATES DISTRICT JUDGE

Dated at Memphis, Tennessee, this 3rd day of June , 1988.

/S/.....
Clerk, U.S. District Court

CERTIFICATE OF SERVICE

I hereby certify that two true and exact copies of the foregoing have been forwarded by pre-paid registered mail to Ms. Norma Crippen Ballard, Assistant Attorney General, at 450 James Robertson Parkway, Nashville, Tennessee 37219-5025, on this the 1st day of September, 1989.

William F Pepper
Attorney for Appellant
Juris Chambers
8 Stone Buildings
Lincoln's Inn
London WC2A 3TA
Tel: (44) 1 831 9591